Supreme Court, U.S.
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In The
Supreme Court of the United States

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

2. Whether Defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

3. Whether this Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and within the Sixth Circuit Court of Appeals and State Courts on the question of whether double jeopardy principles were violated in factually similar situations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

Now comes Kurt Jones, Petitioner, by Arthur A. Busch, Prosecuting Attorney in and for the County of Genesee, Michigan, by Donald A. Kuebler, Chief Appellate Counsel, and prays that a *writ of certiorari* will issue to review the judgment of the United States Court of Appeals, Sixth Circuit, filed June 6, 2002, mandate issued July 2, 2002, which affirmed the United States District Court's *vacatur* of Michigan defendant Duyonn Andre Vincent's conviction for first degree murder on double jeopardy grounds, with direction that the Michigan trial court sentence defendant for the offense of second degree murder.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Court of Appeals was filed February 16, 1996 and is reported as *People v Vincent*, 215 Mich App 458, 546 NW2d 662 (1996). That opinion vacated the defendant's conviction for first degree murder on Double Jeopardy grounds and remanded to the Genesee County Circuit Court for sentencing on the charge of second degree murder. Thereafter the people of Michigan obtained leave to appeal to the Michigan Supreme Court. On July 15, 1997 the Michigan Supreme Court reversed the Michigan Court of Appeals and ordered that defendant's first degree murder conviction be reinstated in *People v Vincent*, 455 Mich 110, 565 NW2d 629 (1997). Rehearing was denied at 456 Mich 1201. Defendant's petition for *certiorari* was denied by the United States Supreme Court November 10, 1997. Defendant filed

for *habeas corpus* relief under 28 U.S.C. sec. 2254 in the United States District Court for the Eastern District of Michigan which vacated his conviction for first degree murder on Double Jeopardy grounds. *Vincent v Jones*, 98-40007 (Nov. 7, 2000). Petitioner Jones appealed to the United States Court of Appeals, Sixth Circuit. On June 6, 2002 the Court of Appeals entered its opinion affirming the District Court below and on July 2, 2002, the Court issued its mandate. *Vincent v Jones*, 292 F3d 506 (CA 6 2002). [Copies of the opinions below and the referenced order of mandate are included in the appendix to this petition, *infra*., App. 1a-83a]

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. s. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The constitutional provision involved in this petition is Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONCISE STATEMENT OF THE CASE

A jury in Genesee County, Michigan convicted defendant Duyonn Andre Vincent of first degree murder, MCL 750.316 and felony firearm, MCL 750.227b. [Tr. Vol VII, p 70] Cofelon Dameon Perkins was convicted by the same jury of first degree murder and felony firearm. Cofelon Marcus Hopkins was convicted by a separate jury of involuntary manslaughter and felony firearm. [Tr. Vol. VII, p 70]

The Michigan Court of Appeals vacated defendant Vincent's first degree murder conviction and reduced it to second degree murder on double jeopardy grounds. *People v Vincent*, 215 Mich App 458 (1996); [App. 14a-25a] The Genesee County Prosecuting Attorney was granted leave to appeal to the Michigan Supreme Court and that Court reversed the Court of Appeals and ordered reinstatement of defendant's first degree murder conviction. *People v Vincent*, 455 Mich 110 (1997) [App. 26a-51a]

Defendant Vincent's petition for a *writ of certiorari* was denied by the United States Supreme Court on November 10, 1997 at 522 US 972, 139 L Ed 2d 325, 118 S Ct 424, 1997 LEXIS 6803.

On January 8, 1998 Petitioner Vincent filed for a writ of *habeas corpus* under 28 U.S.C. sec. 2254 in the US District Court for the Eastern District of Michigan. Defendant contended "the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to

writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United States Supreme Court precedent." The case was referred to the magistrate judge who recommended granting the writ. The District Court, considering the matter *de novo* found that the statements of the trial court were sufficient to rise to the level of an acquittal of the first degree murder charge under United States Supreme Court precedent and that continuation of the trial constituted a violation of the double jeopardy clause of the Fifth Amendment. See Report and Recommendation of Magistrate, App. 52a-77a and Opinion and Order of Gadola, J., granting *habeas corpus*.

Petitioner Jones appealed the United States Court of Appeals, Sixth Circuit.

On June 6, 2002 the United States Court of Appeals, Sixth Circuit, affirmed the District Court and held as a matter of law, the statements of the trial judge constituted a directed verdict of acquittal such that jeopardy attached, and that the trial court could not reverse that decision later in the trial and permit the case to go to the jury for decision. The Court said it was irrelevant whether the trial judge informed the jury of his decision. The Court found that the trial judge had made a determination on the facts that there was insufficient evidence of first degree murder and that by later submitting the case to the jury on the charge of murder, the trial judge subjected the petitioner to prosecution for first degree murder in violation of the Double Jeopardy Clause. [App. 1a-12a] The Court of Appeals issued its Mandate on July 2, 2002. [App. 13a]

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents this Honorable Court with the opportunity to resolve the question of whether the trial court's oral response to defendant's motion for directed verdict, which was never communicated to the jury, represented a resolution in defendant's favor, correct or not, of factual elements of the charged offense of first degree murder, thus barring further proceedings on the charge of first degree murder.

The United States Court of Appeals, Sixth Circuit, in the case *sub judice*, has decided federal questions and interpreted the Fifth Amendment in a way that is in conflict with decisions of other courts, state and federal, and within the Sixth Circuit, and this Court.

The opinion of the Sixth Circuit Court of Appeals is not supported by any recent decision of the United States Supreme Court. Moreover, recently decided cases of State Courts, other United States Courts of Appeals and within the Sixth Circuit, give substantial support to the contention of Petitioner that under the facts of this case Defendant Vincent's Fifth Amendment protection against double jeopardy was not violated.

ARGUMENT

1. The Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

Where a state court adjudicates a petitioner's constitutional claim on the merits, 28 U.S.C. sec. 2254 provides

the standard of review in a subsequent *habeas corpus* action. *Harpster v Ohio*, 182 F3d 322, 326 (6th Cir. 1997). The writ may issue only if the state court's consideration of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Sec. 2254(d)(1), or was based on an "unreasonable determination of the facts in light of the evidence presented." Sec. 2254(d)(2). In applying the "unreasonable application" clause, the Court must conclude that the "state court's application of clearly established federal law was objectively unreasonable." *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 1521, 146 L Ed 2d 389, 428 (2000). The Court, on *habeas corpus*, "may not issue the writ simply because that Court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." Id., at 1522, 146 L Ed 2d at 429; *Nevers v Killinger*, 169 F3d 352 (6th Cir. 1999).

The Michigan Supreme Court found that Defendant Vincent's motion for directed verdict had not, in fact, been granted by the trial court. The Court thus did not reach the double jeopardy question. [App. 26a-42a]

The Court first noted that two panels of the Michigan Court of Appeals affirmed the convictions of defendant Vincent's cofelons and denied relief on double jeopardy claims in each case, finding that the trial court had not, in fact, directed a verdict of acquittal on the first degree murder charge. 455 Mich 110, 115-117. Only the Michigan Court of Appeals panel considering defendant Vincent's appeal had reached the conclusion that an order had been granted. [App. 14a-25a]

The Michigan Supreme Court acknowledged that a directed verdict is an acquittal for purposes of the double jeopardy clause, and that its determination of whether the trial court's statements constitute a dispositive order was crucial to the claim. The Court said that under *People v Hampton,* 407 Mich 354 (1979), the trial court considering a motion for directed verdict must evaluate the evidence and determine the legal sufficiency thereof in the light most favorable to the prosecution. The Court said that a retrial is not allowed if the Court evaluated the evidence but did not find it to be insufficient, citing *People v Mehall*, 454 Mich 1, 6 (1997). The record fact that the trial judge in this case had not done so was a factor in the Michigan Supreme Court's conclusions:

> "We are not convinced that the standards articulated in *Hampton* and *Mehall* were met in this trial judge's statement of his impressions, nor are we convinced that the judge's statement rose to the requisite level of certainty and finality to constitute a directed verdict. There was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. *Mehall* at 6. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the Court considered or rejected because there was no mention of them reflected in the express remarks of the Court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was considering all the factors, there was no indication which factors he had actually considered or rejected.
>
> Accordingly we hold this general inconclusive statement to be no more than a judge thinking out loud. The foundation laid to support this

> conclusory impression was inadequate. When ruling on the sufficiency of the evidence, a Court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis for the decision and a clear statement that the motion is either granted or denied." [App. 37a-38a]

The Court also noted the well accepted rule that Courts speak through their judgments and decrees and not by what is stated in open Court. That is, "a judgment or order is reduced to written form, . . . until reduced to writing and signed, the judgment did not become effective . . . . " Id., at 122, 123. [App. 38a]

The Michigan Supreme Court then noted the similarities between the case *sub judice* and decisions from other jurisdictions such as *State v Collins*, 112 Wash 2d 303, 771 P2d 350 (1989); *People v Jackson*, 647 NYS2d 764 (1966); *State v Newfield*, 788 P2d 1366 (Ariz. App. 1989) where those Courts in similar circumstances found that the defendants' double jeopardy rights had not been violated, citing *United States v Bruno*, 873 F2d 555, 562 (CA 2 1989). The Michigan Supreme Court found that a decision to submit the case to the jury implicitly denies the motion for directed verdict. [App. 39a, 41a]

In the District Court, Gadola, J., Petitioner Jones argued that the Michigan Supreme Court's conclusion that the trial court had not rendered a final judgment on the defendant's motion for directed verdict was a factual conclusion entitled to the presumption of correctness under 28 U.S.C. sec. 2254(e)(2).

The Court of Appeals in the case *sub judice* rejected the argument and agreed with the District Court that whether the state trial judge acquitted the petitioner of

first-degree murder is a question of law and not one of fact. [App. 9a] But the Court then goes on to review the language of the Michigan trial judge and concluded that his statement was not ambiguous and that his later comments reflected his belief that he had granted a motion for directed verdict. The Court also cites to a docket entry which makes reference to the motions for directed verdict and the entry stating "Court amended Ct: 1 Open murder to 2nd Degree Murder." [App. 11a] The Court concluded "Thus, the trial judge made a determination on the facts that there was insufficient evidence of first-degree murder. By later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause. [App. 12a]

2. Defendant Vincent was not placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

Petitioner Jones submits that the Court of Appeals decision herein is contrary to the prevailing jurisprudence. The question of whether there is an acquittal depends largely on state law. *Michigan v Long*, 463 US 1032, 103 S Ct 3469, 77 L Ed 2d 1201 (1983); *Schiro v Clark*, 754 F Supp 646, 660 (N.D. Ind. 1990). In *US v Lanzotti*, 90 F3d 1217 (7th Cir. 1996), the Court said an "acquittal" in the context of double jeopardy means a "resolution, correct or not, of some or all of the factual elements of the offense charged." [citing *Burks v US*, 437 US 1, 10, 98 S Ct at 2147] Thus, for a ruling to be considered a functional

acquittal, it must speak to the factual innocence of the defendant. 437 US 1, 15, 98 S Ct at 2149; *Scott*, 437 US at 97, 98 . . . " See also *US v Kennings*, 861 F2d 381 (CA 3 1988).

In *US v Branch*, 91 F3d 699 (CA 5 1996), the Court of Appeals held that the district judge's comments at a bench conference expressing his misapprehension regarding the validity of inconsistent jury verdicts did not reflect any doubt regarding the sufficiency of the evidence and, thus, the double jeopardy clause did not bar reinstatement of the verdict. See also *US v Affinito*, 873 F2d 1261 (CA 9 1989) where the prosecutor appealed from an order of the district court granting a motion for a judgment of acquittal in a mail fraud case. The Court of Appeals held that the lower court's order granting acquittal was erroneous and that the trial court never stated that the evidence was insufficient to demonstrate a deprivation of money or property rights. The Court observed that the trial court's *ore tenus* ruling evidenced ambivalence about the best way to rectify the defective indictment and jury instructions.

Other state courts have held that even where there has been an order directing a verdict of acquittal, the order may be set aside where the jury has not been discharged. See 75 Am Jur 2d, Trial, sec. 1042, citing *Campbell v Schoering*, 735 SW2d 145 (1988). See also *State v Iovino*, 524 A2d 557, 558, 559 (RI 1987) where the court, citing *Martin Linen Supply Co.* said " . . . the distinction . . . lies in the facts that the reconsideration in this case had no effect on the continuance of the trial in which it was made, that the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of reprosecution beyond the jury already

assembled to hear his case." See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997).

3. This Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and a split of opinion within the Sixth Circuit and State Courts on the question of whether double jeopardy principles were violated in factually similar circumstances.

The Court of Appeals in the case *sub judice* failed to refer to or acknowledge the existence of Sixth Circuit jurisprudence on the issue at hand. That is, the Court did not cite or discuss the recent decision in *US v Baggett*, 251 F3d 1087 (CA 6 2001), *rehrg. denied* July 31, 2001, 2001 U.S. App LEXIS 19012, *cert. denied* Feb. 25, 2002 reported at 2002 LEXIS 1269. There the Court said that whether the government may appeal a judgment of acquittal entered by the district court under Fed. R. Crim. P. 29 depends on the timing of the Court's decision. The Court said the central question is whether the district court granted the defendant's motion for judgment of acquittal prior to the jury's verdict, in which case double jeopardy would deprive the Court of Appeals of jurisdiction under 18 U.S.C. sec. 3731, or whether it reserved decision on the motion until after the jury's verdict in which case double jeopardy did not prevent review. The Court found that ambiguity in the record of the proceedings rendered the question difficult to answer, but found that several factors suggested that the trial court intended to reserve decision on defendant's motion until after the jury returned a verdict. Judge R. Guy Cole, Jr., of the Sixth Circuit summarized the proceedings involved as follows:

> First, the District Court stated, "I will grant the government's request to allow it to go to the jury – and to hold the Court's ruling in abeyance until after that." This statement immediately followed a discussion between counsel and the court regarding the government's concern that it would be prohibited from appealing if the court granted the motion before submitting the case to the jury. It appears, therefore, that the government's desire to preserve its ability to appeal was the direct cause of the court's decision to "hold its ruling in abeyance." [251 F3d at 1094]

While the written order granting the defendant's motion was filed in the clerk's office and entered on the docket on September 9, 1999, the jury's verdict was returned in open court and entered on the docket on September 8, 1999. The Court also found that it was significant that the Court entertained closing arguments by counsel, instructed the jury on the applicable law, and allowed the jury to deliberate and return a verdict. The Court found that such a course of action would have been entirely unnecessary if the Court had rendered an effective judgment of acquittal at the close of all the evidence. Notwithstanding the district court's confused handling of the Defendant's Rule 29 Motion, the Court was persuaded that the district court reserved its decision until after the jury returned its verdict. The Court found that both the Second and Ninth Circuits have held that double jeopardy principles were not violated in factually similar situations, citing *US v Byrne*, 203 F3d 671 (9th Cir. 2000) and *US v LoRusso*, 695 F3d 45 (2d Cir. 1982). The Court concluded that both *Bryne* and *LoRusso* stand for the proposition that an oral grant of a Rule 29 Motion outside the jury's presence does not terminate jeopardy, inasmuch as a Court is free to change its mind prior to the entry of a

judgment. As in *Bryne* and *LoRusso*, the jury in *Baggett* was not present or informed of the Judge's oral ruling on the Defendant's motion for acquittal. The jury deliberated and returned a guilty verdict. The *Baggett* Court said "This fact more than any other supports our conclusion that the double jeopardy clause does not bar the government's appeal. Because reversal of the district court's judgment on appeal does not require the government to retry defendant, but rather requires only reinstatement of the jury's guilty verdict, the double jeopardy clause is not offended." [Citation omitted] [251 F3d at 1095]]

Petitioner Jones submits that a similar ruling should have entered in the case *sub judice*, as in *State v Iovino*, 524 A2d 557 (R.I. 1987), *supra*, where the Court citing *Martin Linen Supply Co.* held in pertinent part that the double jeopardy clause does not prohibit a conviction where the defendant is not faced with any threat of reprosecution beyond the jury already impaneled to hear his case. [524 A2d at 558, 559]. Cf., also App. 23a, fn. 4 where the Michigan Supreme Court cites and discusses the *Iovino* decision. See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997). Such was the situation in the case at bar where Defendant Vincent's jury was not informed of proceedings involving the Motion for directed verdict and proceeded to decision on the charge of first degree murder following defendant's presentation of evidence, closing arguments of the prosecuting attorney and defense counsel, and jury instructions.

Where the case involves important legal questions and the Courts of Appeals have previously rendered contrary results, this Court has granted *certiorari* to resolve the conflict. See e.g., *United States v Muniz*, 374 US 150, 83 S Ct 1050, 10 L Ed 2d 805 (1963).

Petitioner Jones submits that on the record in this case and the jurisprudence, *certiorari* should be granted, and the Sixth Circuit Court of Appeals decision should be reversed and Defendant Vincent's conviction for first degree murder reinstated.

Date: October 1, 2002

Respectfully Submitted,

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DUYONN ANDRE VINCENT, Petitioner-Appellee,
v. KURT JONES, Respondent-Appellant.

No. 00-2441

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

April 30, 2002, Argued
June 6, 2002, Decided
June 6, 2002, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Flint. No. 98-40007. Paul V. Gadola, District Judge.

DISPOSITION: Affirmed.

COUNSEL: ARGUED: Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellant.

David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

ON BRIEF: Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellant.

David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

JUDGES: Before: SUHRHEINRICH and GILMAN, Circuit Judges; HOOD, District Judge.*

OPINION BY: JOSEPH M. HOOD

OPINION:

JOSEPH M. HOOD, District Judge. This is an appeal from a decision granting a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted by a jury of first-degree murder. At the close of the prosecution's case, Petitioner moved for a directed verdict on the first-degree murder charge. At issue is whether the state trial judge granted a directed verdict at that time such that the continuation of the trial and submission of the first-degree murder charge to the jury constituted double jeopardy. Inasmuch as the state trial judge's comments, coupled with the state court's docket entry, amounted to an acquittal on the first-degree murder charge, the district court's decision granting the writ of habeas corpus is **AFFIRMED**.

FACTUAL BACKGROUND

Petitioner and two co-defendants were charged with open murder and possession of a weapon in the commission of a felony. The charges arose from a shooting death that occurred during a confrontation between two groups of youths at a high school in Flint, Michigan. The three defendants were tried before two separate juries during

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

one trial. At the close of the prosecution's case in chief, and outside the hearing of the jury, counsel for all three defendants moved for directed verdicts of acquittal on the charges of first-degree murder, on the grounds that there was insufficient evidence of premeditation and deliberation. After all parties had presented their arguments, the trial judge said:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

See J.A. 220, Trial Colloquy (3/31/92). The trial judge then discussed several unrelated matters with the attorneys. Finally, prior to adjourning for the day, the prosecutor requested to make a brief restatement regarding first-degree murder the following morning. The trial judge agreed to hear him.

The next day, April 1, 1992, the court allowed the prosecutor to make a presentation regarding the propriety of directing a verdict on the first-degree murder charges. Defense counsel for the petitioner objected on the basis that the Court had granted the motion for directed verdict the day before and that jeopardy had attached at that time. The trial judge responded:

> Do you really believe that? You think that when a decision is made that before it's recited the parties who are directly involved in it and particularly the jury we're asking now for the jury not to consider certain factors that might be brought to them, that a Court cannot consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

See J.A. 195, Trial Colloquy (4/1/92). When counsel for one of the co-defendants joined in objecting on double jeopardy grounds, the following exchange took place:

> THE COURT: You think double jeopardy has anything to do with this?
>
> MS. CUMMINGS: Yes. I believe once you've directed. A verdict –
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's . . .
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.

> THE COURT: Oh, I granted a motion but I have not directed a verdict.

See J.A. 197-8, Trial Colloquy (4/1/92). After hearing all the parties, the trial court decided to take the motion under advisement, stating:

> Well, I'm going to consider the argument that Counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Courts ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it. Now I'm basing, of course, the decision upon what we have up until such a time as the motion's being made. But I'll reserve the ruling.

See J.A. 205, Trial Colloquy (4/1/92). The trial resumed and Petitioner and other witness testified. The next morning, April 2, 1992, the trial judge stated:

> I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, Second, Manslaughter and you can go on from there.

See J.A. 207-8, Trial Colloquy (4/2/92). The jury subsequently convicted the petitioner of first-degree murder. His co-defendants were convicted of second-degree murder and involuntary manslaughter.

All three defendants appealed their judgments, at least in part, on double jeopardy grounds. Separate

Michigan Court of Appeals panels considered each appeal. The two panels which heard Petitioner's co-defendants' appeals determined that there was no double jeopardy violation because the trial judge had not ordered a directed verdict. The panel hearing Petitioner's appeal determined that the trial judge had ordered a directed verdict and could not constitutionally reverse a grant of directed verdict later in the trial. The panel reversed Petitioner's first-degree murder conviction on double jeopardy grounds and ordered entry of a conviction of second-degree murder and re-sentencing. *Michigan v. Vincent,* 546 N.W.2d 662 (Mich. Ct. App. 1996). Petitioner's case was appealed to the Michigan Supreme Court, which reversed the Court of Appeals in a 4 to 3 decision, finding that the trial judge had not ordered a directed verdict. *Michigan v. Vincent,* 565 N.W.2d 629 (Mich. 1997). Petitioner filed a motion to reconsider, pointing out a docket entry which indicated that the trial judge had granted the motion for directed verdict.[1] The Michigan Supreme Court denied the motion without comment. Petitioner's petition for a writ of certiorari was denied by the United States Supreme Court on November 10, 1997.

On January 8, 1998, Petitioner filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, arguing that "the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United

[1] This docket entry was not discovered until after the Michigan Supreme Court had rendered its decision.

States Supreme Court precedent." Petitioner's Brief at 13. The district court referred the matter to a magistrate judge who subsequently recommended granting the writ. After considering the matter *de novo* in light of the respondent's objections, the district court found that the statements of the trial judge were sufficient to rise to the level of an acquittal of the first-degree murder charge under United States Supreme Court precedent, such that the continuation of the trial constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. The petition for a writ of habeas corpus was granted, and this appeal timely followed.

STANDARD OF REVIEW

A district court's legal conclusions in a habeas proceeding are reviewed *de novo* and its factual findings are reviewed for clear error. *House v. Bell,* 283 F.3d 737 (6th Cir. 2002). Under 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under this provision, a writ may issue if the state court applied a legal rule that contradicts United States Supreme Court precedent, or if the state court applied the correct legal rule but its application of the rule to the facts of the case was objectively unreasonable. *Williams v. Taylor,* 529 U.S. 362, 405-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

DISCUSSION

Respondent argues that the district court's decision that the trial judge violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution was erroneous on two alternate grounds. Initially, Respondent argues that the Michigan Supreme Court's determination that the trial judge's statements were not a directed verdict is entitled to deference. Alternatively, Respondent argues that the state trial judge could reconsider his grant of the motion for directed verdict shortly thereafter without violating the Double Jeopardy Clause.

Respondent initially contends that the state trial judge did not order a directed verdict by his statements on March 31, 1992. His position is that the Michigan Supreme Court's determination that the statements were not a directed verdict was a factual determination that is entitled to deference under 28 U.S.C. § 2254(e).[2] The

[2] In pertinent part, 28 U.S.C. § 2254 provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The

(Continued on following page)

district court took the position that the Michigan Supreme Court's determination was not a factual finding by holding that the state trial judge's statements were not in dispute; rather, it was the legal significance of those statements that was in dispute.

Once a defendant has been acquitted of a crime, the Double Jeopardy Clause prohibits any further prosecution of the defendant for that crime. *See* U.S. Const. amend. V.; *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977). "Whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania,* 476 U.S. 140, 145, 90 L. Ed. 2d 116, 106 S. Ct. 1745 (1986). In *Martin Linen* the Supreme Court stated that:

> We have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

430 U.S. at 571 (citations omitted). *See also Smalis,* 476 U.S. at 144.

We agree with the district court that whether the state trial judge acquitted the petitioner of first-degree murder is a question of law and not one of fact. In this

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

case, the statements of the trial judge are not in question. Rather it is the legal significance of these statements that is the focus of our inquiry. Accordingly, we are not bound by the holding of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law. Instead, we must examine the state trial judge's comments to determine whether he made a ruling which resolved the factual elements of the first-degree murder charge. Such a conclusion is supported by the United States Supreme Court's decision in *Smalis,* where, in considering whether the grant of a demurrer constitutes an acquittal for the purposes of double jeopardy, Justice White, speaking for a unanimous court, wrote:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause, so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

Smalis, 476 U.S. at 144 fn5 (citations omitted).

A review of the trial transcript reveals that the trial judge initially granted the motion for directed verdict through his statements at the end of the day March 31, 1992. He then allowed the government to reargue the issue the next morning and took the matter under advisement. The following morning, two days after granting the motion, he reversed his decision.

Our conclusion that the trial judge granted the motion is warranted by the precise language he used. At the end

of the day, after hearing oral arguments, the trial judge concluded:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

See J.A. 220. There was no ambiguity in this statement. Furthermore, the trial judge's later comments clearly reflect his belief that he had previously granted the motion for a directed verdict. *See* J.A. 198 ("Oh, I granted a motion but I have not directed a verdict."); J.A. 205 ("And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Courts [sic] ruling earlier."); J.A. 207 ("I've reconsidered the ruling that the Court made . . . "). Additional support is found in the docket sheet which contained the following entry for March 31, 1992:

MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: 1 OPEN MURDER TO 2ND DEGREE MURDER.

See J.A. 87.

We now address whether the above statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy attached. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977). We find that when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such that jeopardy attached. We further find that he was not entitled to reverse that decision later in the trial. It is irrelevant whether the trial judge had informed the jury of his decision. After hearing oral arguments on the issue by both parties, the trial judge concluded that the government had not proved premeditation or planning in the slaying, a required element for first-degree murder. *See* J.A. 220. Thus, the trial judge made a determination on the facts that there was insufficient evidence of first-degree murder. By later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause.

CONCLUSION

For the forgoing reasons, we **AFFIRM** the district court's decision granting habeas corpus relief pursuant to 28 U.S.C. § 2254.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 00-2441

Filed: July 2, 2002

DUYONN ANDRE VINCENT

Petitioner-Appellee

v.

KURT JONES

Respondents-Appellant

MANDATE

Pursuant to the court's disposition that was filed 6/6/02 the mandate for this case hereby issues today.

A True Copy.

COSTS: **NONE**

Filing Fee .....$
Printing .....$

Total .....$

Attest:

/s/ [Illegible]
Deputy Clerk

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215 MICH APP 458

Michigan Court of Appeals

People

v.

Duyonn Andre Vincent

Docket No. 157220. Submitted January 17, 1996, at Detroit. Decided February 16, 1996, at 9:00 A.M. Leave to appeal sought.

State Appellate Defender (by *Randy E. Davidson*), for the defendant on appeal.

Before: TAYLOR, P.J., and JANSEN and SMOLENSKI, JJ.

TAYLOR, P.J. Defendant appeals as of right from a jury conviction of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We reverse.

Defendant and two others were jointly tried as a result of a fatal shooting. Defendant, Marcus Hopkins, and Dameon Perkins, were all charged with open murder and felony-firearm. The charges were considered by two juries. The case against Perkins was considered by one jury, and a second jury considered the case against defendant and Hopkins. Perkins' jury convicted him of second-degree murder and felony-firearm. Defendant's and Hopkins' jury convicted Hopkins of involuntary manslaughter and felony-firearm. This same jury convicted defendant of first-degree murder and felony-firearm. Hopkins' and Perkins' convictions were affirmed on appeal in separate unpublished opinions. *People v. Hopkins*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 1995 (Docket No. 158133); *People v. Perkins*, unpublished

opinion per curiam of the Court of Appeals, issued November 21, 1995 (Docket No. 160177).

Defendant argues on appeal that his conviction of first-degree murder violated his constitutional right not to be placed twice in jeopardy, US Const, Am V; Const 1963, art 1, § 15. We agree.

At the close of the prosecutor's case, defense counsel moved for a directed verdict of acquittal with respect to the charge of first-degree murder and asked the court to permit the jury to consider only the crime of second-degree murder. Similar motions were made by the codefendants. The prosecutor opposed the motions, arguing that the evidence was sufficient to establish first-degree murder when viewed in a light most favorable to the prosecution. The court then stated as follows:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is second-degree murder. . . . I think that second-degree murder is an appropriate charge as to the defendants.

The parties then discussed several housekeeping matters, including whether the different juries would be present during presentation of defendant's defense, how long witnesses were expected to testify, and the logistics of moving the juries and witnesses in and out of the courtroom. After the three defendants left the courtroom, the prosecutor asked if he could make a brief "restatement" in terms of the first-degree murder charge when the juries came back the next morning because he wanted to find some law relating to the matter at issue. The court said it would be glad to hear the prosecutor. The next morning

the prosecutor argued that, on the basis of the evidence and the law, the jury should determine if first-degree murder had been established. At the conclusion of the prosecutor's arguments, defense counsel argued that the court had granted a directed verdict with regard to the first-degree murder charge the previous day and cited the constitutional prohibition against placing a defendant in double jeopardy. The court advised defense counsel that it had not informed the jury "of any of these things." Defense counsel reiterated his contention that a decision had been made the previous day. The court said that it did not believe a court is precluded from reconsidering a decision already made if that decision has not been recited to the parties, particularly the jury. When counsel for Hopkins cited the Double Jeopardy Clause, the court said that it had not directed a verdict for anybody. Counsel for Hopkins then told the court that it had granted his motion. The court then stated: "Oh, I granted a motion but I have not directed a verdict." The prosecutor proceeded to present further argument in support of his position. The court then stated that it was going to consider the argument counsel had made and that no harm had come about by the "court's ruling earlier" because the jury had not been informed of "the conclusion this court drew" after arguments of counsel. The court then said that it was going to reserve ruling. Following that ruling, the defense presented its case, in which defendant called one witness and also testified in his own behalf. After all defendants had rested, the court said:

> I've reconsidered the ruling that the court earlier made and I've decided to let the jury make its own determination on the degrees.

Thereafter, the court submitted the first-degree murder charge against defendant to the jury, and he was found guilty of first-degree murder. After the jury returned its verdict, defense counsel renewed his motion for a directed verdict, which the court denied.

The propriety of the trial court's reconsidering its ruling that premeditation had not been shown, and allowing the jury to consider first-degree murder, has previously been considered by the panels of this Court that affirmed the convictions of codefendants Hopkins and Perkins. The *Hopkins* and *Perkins* panels, in unpublished opinions, held that Hopkins' and Perkins' double jeopardy rights had not been violated. Because these opinions were not published, they are not binding on this panel. Administrative Order No. 1994-4 provides only that a panel of this Court must follow the rule of law established in a prior Court of Appeals' *published* decision issued on or after November 1, 1990, unless reversed or modified by the Supreme Court or a special panel of this Court. Further, MCR 7.215(C) provides that an unpublished opinion is not precedentially binding under the rule of stare decisis. While we believe that inconsistent results on appeal involving codefendants are undesirable, *People v. Hayden,* 132 Mich App 273; 288-289, n 8; 348 NW2d 672 (1984), we are persuaded that defendant's constitutional right not to be placed twice in jeopardy was violated and, therefore, are compelled to reverse his first-degree murder conviction.

The prosecutor has not filed a brief on appeal to contest defendant's claim that his double jeopardy rights were violated. We can only assume that the prosecutor believes this Court will follow the analysis of the *Hopkins* and *Perkins* panels and find no double jeopardy violation. The *Perkins* panel found no double jeopardy violation,

even though the trial court had indicated the proofs supported only second-degree murder, stating:

> Since the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated.

This conclusion of the *Perkins* panel is not supported by any authority.

The *Hopkins* panel resolved the double jeopardy issue as follows:

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling.
>
> Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter.

This conclusion in *Hopkins* is also not supported by any authority.

In *Smalis v. Pennsylvania,* 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986), the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

This Court's research has located several cases with facts similar to those in the case at bar that support our finding that defendant's double jeopardy rights were violated.

In *Brooks v. Maryland,* 299 Md 146; 472 A2d 981 (1984), the Maryland Court of Appeals considered a case where the trial court granted a motion for a directed verdict and "shortly thereafter" the prosecutor asked the court to reconsider its ruling. After hearing further argument from the prosecutor, the trial court reversed the grant of a directed verdict and denied the motion. The appellate court reversed the defendant's jury conviction on double jeopardy grounds, stating:

> He [the judge] was belatedly persuaded in the light of the prosecution's tardy argument that the issue was for the jury. . . . [B]oth the State's

> argument and the judge's new ruling came too late. Once a trial judge intentionally acquits a defendant of a criminal offense over which the court has jurisdiction, the prohibition against double jeopardy does not permit him to change his mind. The grant of the motion for judgment of acquittal was a bar to further criminal proceedings on the same charge. [*Id.*, p 155.]

In *Lowe v. Kansas,* 242 Kan 64; 744 P2d 856 (1987), the Kansas Supreme Court considered a case where the trial court, outside the jury's presence, dismissed a charge on the basis of insufficient evidence after the state had rested its case. The following morning, the trial court reversed its earlier ruling and reinstated the charge. The appellate court reversed the defendant's jury conviction, citing *Smalis,* and stating:

> The reinstatement of the theft charge the next day and its submission to the jury constituted "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" which, under *Smalis,* constituted a violation of the prohibition against double jeopardy. [*Id.*, p 67.]

In *People v. Lerner,* 128 AD2d 641; 512 NYS2d 886 (1987), the New York Supreme Court, Appellate Division, considered a case where the trial court granted a motion for a directed verdict of a kidnapping count. At the start of the trial the following day, the prosecutor moved to reargue the motion. The trial court allowed the prosecutor to reargue the motion and then reserved decision on the defendant's motion. The appellate court reversed the defendant's jury conviction, stating:

> The trial order of dismissal granted at the conclusion of the People's case or at the conclusion of all of the evidence is "tantamount to an acquittal" (*People v. Zagarino,* 74 AD2d 115, 120; 427 NYS2d 40), and to allow reargument of such an order and the submission of a count previously dismissed pursuant thereto to a jury, would clearly violate the constitutional prohibition against double jeopardy. [*Id.*, p 644.]

In *People v. Strong,* 129 Ill App 3d 427; 472 NE2d 1152 (1984), the Illinois Court of Appeals considered a case where the trial court granted a motion for a directed verdict at the close of the state's case. The following day the prosecutor asked the trial court to reconsider its decision, at which time the court rescinded its previous decision and submitted the matter to the jury. The appellate court reversed the defendant's jury conviction, stating:

> Although as the State argues, and we confirm, the court erred in directing the verdict of acquittal on the home invasion charge, it is well settled that the legal effect of the directed verdict was to bar, under double jeopardy principles, the vacation or reversal of that verdict. Unquestionably, the allowance of defendants' motion for a directed verdict on the home invasion charge at the close of the State's case constituted a final adjudication on the merits of that charge. A trial court, therefore, may not withdraw an order directing a verdict and permit the jury to make a finding on the charge. [*Id.*, pp 430-431 (citations omitted).]

In *Arizona v. Millanes,* 180 Ariz App 418; 885 P2d 106 (1994), the trial court granted a motion for acquittal. The prosecutor twice sought to have the court reconsider the acquittal. After a recess, the court reversed its earlier

ruling. The Arizona Court of Appeals reversed the defendant's jury conviction, citing *Smalis,* and the Kansas Supreme Court's decision in *Lowe,* on the basis that the trial court's reversal of its earlier grant of an acquittal violated the defendant's right not to be placed twice in jeopardy.

The fact that the trial court in the case at bar did not inform the jury that it had directed a verdict of not guilty with regard to the first-degree murder charge did not prevent its ruling from taking effect. *Lowe, supra.* Indeed, in *Lowe,* the Kansas Supreme Court, on the basis of *Smalis,* overruled its prior decision in the *Lowe* case that had cited a lack of prejudice to the defendant in that no intervening proceedings had taken place before the jury when the trial court reversed its earlier grant of an acquittal.

The trial court communicated its decision directing a verdict of acquittal with respect to the first-degree murder charge to the prosecutor, all three defense counsel, and all three defendants. This made the court's ruling binding.

We reject any suggestion that the trial court did not actually direct a verdict of acquittal with respect to the first-degree murder charge after hearing the arguments of counsel. While the court's words, "Well, my impression at this time," may be somewhat ambiguous, the court's following statement, "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the court acknowledged he had granted the motions for a directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the

court said it had reconsidered the "ruling" it had previously made.

The trial court's characterization of its actions is not controlling, *People v. Anderson,* 409 Mich 474, 486; 295 NW2d 482 (1980), but it does support our conclusion that the court directed a verdict of acquittal with respect to the first-degree murder charge. The trial court's claim that it had not directed a verdict (apparently on the basis that it had not informed the jury of its decision), even though it had granted motions for a directed verdict, was contradictory and was based on an irrelevant consideration. The trial court's ruling was not inadvertent or a slip of the tongue, see *Pugh v. Maryland,* 271 Md 701; 319 A2d 542 (1974), but was a decision made after hearing arguments from four attorneys. Nor was there merely a continuing discussion on the record, see *Arizona v. Newfield,* 161 Ariz App 470; 778 P2d 1366 (1989), or mere ruminating by the court. The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal with respect to the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra.*

We also find that MCR 2.604(A) is inapplicable. This court rule states that an order or decision adjudicating fewer than all claims is subject to revision before entry of final judgment adjudicating all the claims. We believe MCR 2.604(A) applies only to civil actions and is therefore

inapplicable. MCR 6.001(D)(2). Assuming, arguendo, that MCR 2.604(A) does apply to criminal cases, we find that it would, in the case at bar, be unconstitutional. A trial court's determination of insufficient evidence producing a directed verdict of acquittal terminates jeopardy with respect to that particular charge. *Vanderbilt v. Collins,* 994 F2d 189, 195 (CA 5, 1993). Once jeopardy has terminated regarding a particular charge, double jeopardy protections forbid further proceedings, such as jury deliberations, relating to that charge. *Smalis, supra; Lowe, supra.*

We further note that the trial court violated MCR 6.419(A). This court rule states:

> Before Submission to Jury. After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, *the court* on its own initiative may, or *on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion.* If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. [Emphasis added.]

After initially granting defendant's motion, the trial court decided to reserve ruling. However, the court rule quite clearly forbade the court from reserving its decision with respect to defendant's motion. The trial court's subsequent denial of defendant's motion after defendant had testified was a violation of the court rule. At the time defendant gave his testimony, he did not know if he faced a charge of first-degree murder or second-degree murder. However, pursuant to MCR 6.419(A), defendant was

entitled to know the most serious charge he faced before he testified on his own behalf.

Defendant's claim that the trial court erred when it ultimately denied his motion for a directed verdict of acquittal with respect to the first-degree murder charge is moot, given this Court's resolution of the double jeopardy issue.

We also reject defendant's claim that he is entitled to a new trial or to an order remanding the matter to the trial court so he can move for a new trial based upon an affidavit he submitted. MCR 2.611(A)(1)(f); *People v. Bradshaw,* 165 Mich App 562, 567; 419 NW2d 33 (1988).

We are satisfied that the appropriate remedy is to remand for entry of a conviction of second-degree murder and resentencing. If defendant had been convicted of second-degree murder, when the jury was improperly allowed to consider a first-degree murder charge, he would be entitled to a new trial on a second-degree murder charge because of the possibility of jury compromise. *People v. Vail,* 393 Mich 460, 463-464; 227 NW2d 535 (1975). However, in the case at bar, there was no compromise verdict because defendant was convicted of the most serious charge and the evidence established that defendant was guilty of second-degree murder. Under such circumstances, entry of a conviction of second-degree murder is the appropriate remedy. *People v. Hoffmeister,* 394 Mich 155, 161-162; 229 NW2d 305 (1975).

Reversed and remanded for entry of a conviction of second-degree murder and for resentencing.

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455 MICH 110

Michigan Supreme Court

People

v.

Duyonn Andre Vincent

Docket No. 105808. Argued April 10, 1997 (Calendar No. 12). Decided July 15, 1997. Rehearing denied 456 Mich 1201.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Arthur A. Busch*, Prosecuting Attorney, and *Donald A. Kuebler*, Chief, Research, Training and Appeals, for the people.

State Appellate Defender (by *Randy E. Davidson*) for the defendant.

Amici Curiae:

Ronald J. Bretz and *Patrick Levine Rose* for Criminal Defense Attorneys of Michigan.

Michael Thomas, President, *John D. O'Hair*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief, Research, Training and Appeals, for Prosecuting Attorneys Association of Michigan.

MALLETT, C.J. We granted leave in this case to determine whether the Court of Appeals properly characterized a particular statement made by a trial judge as a directed verdict of acquittal. We reverse the judgment of the Court of Appeals and hold that the judge's inchoate observations did not ripen into a directed verdict of acquittal and did not become a final judgment. There was neither a written or signed order nor an oral or written ruling on the record

sufficiently detailing the reasons for granting or denying the motion. Consequently, the defendant's constitutional right not to be placed twice in jeopardy was not violated by the submission of the issue to the jury.

I

The defendant and his two codefendants were charged with open murder and possession of a firearm during the commission of a felony, arising from the shooting death of Markeis Jones. Jones was shot during a confrontation between two groups of youths at Hamady High School in Flint. The defendant and his friends did not attend Hamady, but were waiting for friends who were attending a dance at the high school. In the school driveway the two groups of youths began arguing. There was some pushing and shoving and some verbal threats. Ultimately several shots were fired out of the back of a Mustang hatchback. Testimony indicated that defendant and codefendant Dameon Perkins fired shots from the back of the car. Codefendant Marcus Hopkins drove the car away as the shots were fired. There is some evidence in the record indicating that the shots missed their intended mark and inadvertently hit Markeis Jones, a friend of the defendants. There is also evidence in the record that the confrontation was gang related, involving rival groups known as "Folks Up" and "Folks Down."

All three young men were charged with open murder and felony firearm and were tried before two separate juries during one trial. Defendant Vincent and codefendant Hopkins were tried by one jury, while codefendant Perkins was tried by a second. At the close of the prosecution's case in chief, counsel for all three defendants moved

for directed verdicts of acquittal on the charges of first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation and that the shooting was unplanned and spontaneous. The prosecution opposed the motion.

When defense counsel had completed their arguments on the motion, the trial court judge responded with the following comment:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

This discussion took place outside the hearing of the jury. Before adjourning the proceedings, the prosecutor requested time the next day to "make a brief restatement in terms of the First Degree Murder . . . ." The judge replied

that he would "be glad to hear it . . . [and that he was] always glad to hear [the] people."

The next day, the prosecution presented an argument regarding the quantum or threshold of evidence sufficient to survive a motion for a directed verdict on the charges of first-degree murder. After hearing both sides, and over the objections of defense counsel, the judge decided to reserve his ruling on the motion until he heard and thought more about the issues. Defense counsel maintained that the judge had directed a verdict resulting in a final judgment of acquittal regarding the first-degree murder charges, and that double jeopardy concerns were implicated.[1]

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[1] We note that in reserving his ruling on the motion for directed verdict that the trial judge violated MCR 6.419(A), which provides:

> After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. *The court may not reserve decision on the defendant's motion.* If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. [Emphasis added.]

Defense counsel cited the rule, but did not object to the trial court's express decision to reserve its ruling on the motion. Counsel's objection was based on their belief that the judge directed a verdict and then changed his mind. We are persuaded that, under the circumstances of this case, any error that might have occurred from the judge's decision to reserve the motion was harmless. The issue was never discussed in front of, or taken from, the jury. Even though it is improper to reserve a ruling on this motion, because the defendant must have notice of the charges he is facing before presenting his proofs, we note that when Vincent testified he was still on notice that he was being tried for first-degree murder. Regardless of the propriety of reserving the motion, the

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The judge, reconsidering his earlier remarks, noted that the jury had not been informed of any of the discussion, and, therefore, the defendant had not been prejudiced. The judge was adamant that he had not directed a verdict, "I haven't directed a verdict to anybody . . . . Oh, I granted a motion but I have not directed a verdict." All three defendants were convicted: Vincent of first-degree murder, Hopkins of involuntary manslaughter, and Perkins of second-degree murder. All three appealed in the Court of Appeals.

Codefendant Hopkins, who had been convicted of involuntary manslaughter, raised the double jeopardy issue on appeal. In an unpublished opinion, the Court of Appeals held that the judge's ruling was not a final judgment or ruling, but the mere expression of an opinion.

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was

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charge was never dropped and the presentation of the defense was not impaired.

See *People v. Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995) (postponing a hearing on a defendant's motion for directed verdict is harmless error where the prosecutor presented sufficient evidence to convict the defendant at the close of his proofs.)

> addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling. Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter. [Unpublished opinion per curiam, issued October 20, 1995 (Docket No. 158133), slip op. at 2.]

The Court also concluded that MCR 6.419, which bars the judge from reserving his ruling on the motion was not violated because in this case Hopkins did not present any proofs and the judge made clear that he wanted the jury to decide between the different degrees of murder. *Id.* at 3. The *Hopkins* Court also concluded that in viewing the evidence in the light most favorable to the prosecution there was sufficient evidence to support a conviction of first-degree murder. Consequently, the trial court did not err in denying the motion. *Id.*

Codefendant Perkins also raised the double jeopardy issue in his separate appeal. In an unpublished opinion, the Court of Appeals noted both that the trial of the first-degree murder charge continued after hearing the prosecution's arguments and that the jury was ultimately instructed on first-degree murder. Accordingly then, the Court held that "[s]ince the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated." Unpublished opinion per curiam,

issued November 21, 1995 (Docket No. 160177), slip op. at 2.

The *Perkins* Court held, just as the Court in *Hopkins,* that the prosecutor had presented sufficient evidence of premeditation and deliberation so the trial court did not err in denying the motion for directed verdict or in instructing the jury on the charge. "We are satisfied that the prosecution did present sufficient evidence from which a rational trier of fact could have concluded that the killing was done with premeditation and deliberation." *Id.*[2]

However, a third panel of the Court of Appeals heard defendant Vincent's appeal, and in a published opinion reversed the decision of the trial court. Vincent also argued that his conviction of first-degree murder violated his constitutional right not to be placed twice in jeopardy. 215 Mich App 458, 460; 546 NW2d 662 (1996). The Court agreed, reversed the conviction, and remanded the case "for entry of a conviction of second-degree murder and for resentencing." *Id.* at 471.[3] The Court conceded that the trial judge's first statement "Well, my impression at this time," was ambiguous, but that the later statement "What we have at the very best is second-degree murder," was not. *Id.* at 468.

[2] This case was remanded to the trial court for resentencing. The Court held that the sentence imposed at the maximum of the guidelines range, fifteen to twenty-five years, was inappropriate, given Perkins' age and lack of criminal history. *Id.* at 1.

[3] The Court noted it was not bound by the two earlier unpublished opinions pursuant to Administrative Order No. 1994-4 and MCR 7.215. *Vincent* at 463.

We reverse the decision of the Court of Appeals and hold, on the basis of the following evaluation, that the judge's inchoate impressions did not mature into a final judgment of acquittal of the charge. Consequently, Vincent's right not to be placed twice in jeopardy was not violated.[4]

[4] Because we have determined that in this case a judgment was not rendered, we need not reach whether or under what circumstances the judge can reverse or correct a ruling. However, we are aware that there is a split of authority among our sister states on this particular question. Compare *United States v. Washington,* 48 F3d 73, 79 (CA 2, 1995) ("oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment'" [citation omitted]); *In re Lionel F,* 76 NY2d 747, 749; 559 NYS2d 228, 558 NE2d 30 (1990) ("There is no constitutional impediment to a court's power to modify its decisions, provided such a modification does not subject an individual to double jeopardy" [citation omitted]); *People v. Dist. Court,* 663 P2d 616, 621 (Colo, 1983) ("we see no reason why the double jeopardy prohibition should preclude a trial judge from correcting during the trial itself an erroneous ruling on a motion for a judgment of acquittal when no threat of retrial would arise from the correction and the accused has suffered no demonstrable prejudice by reason of the correction"); *State v. Iovino,* 524 A2d 556, 560 (RI, 1987) ("the corrected ruling by the trial justice did not in any way inhibit defendant's presentation of any evidence that he might have chosen to adduce in respect to the greater as well as the lesser included offenses"); with *Watson v. State,* 410 So 2d 207, 209 (Fla, 1982) ("the ruling of the trial judge made the day before, without any indication that the matter was still under consideration, had progressed toward finality beyond the point that would permit its retraction or correction"); *Brooks v. State,* 308 Ark 660, 668; 827 SW2d 119 (1992) ("dismissing the robbery charge and then reinstating it at the conclusion of all the evidence could well have curtailed the appellant's ability to present a full defense to this charge").

II

A

We recognize that a judge's characterization of a ruling and the form of the ruling may not be controlling. *People v. Anderson,* 409 Mich 474, 486; 295 NW2d 482 (1980); *United States v. Martin Linen Supply Co,* 430 US 564, 571, n 9; 97 S Ct 1349; 51 L Ed 2d 642 (1977). "The Court must inquire whether 'the ruling in [defendant's] favor was actually an "acquittal" even though the District Court characterized it otherwise.' *United States v. Wilson,* 420 US 332, 336 [95 S Ct 1013; 43 L Ed 2d 232] (1975)." Ultimately what we must determine is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen* at 571.

Determining whether the trial court's statement, made at the conclusion of the defendant's motions for directed verdict, was tantamount to rendering a directed verdict is crucial because, if a directed verdict were rendered, further proceedings would violate the defendant's double jeopardy rights.

> [W]hen a trial court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged. [*Smalis v. Pennsylvania,* 476 US 140, 142; 106 S Ct 1745; 90 L Ed 2d 116 (1986).]

Consequently, under federal precedent and our recent decision in *People v. Nix,* 453 Mich 619; 556 NW2d 866

(1996), characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions. However, we find that *Nix* is distinguishable from the case at bar. In *Nix,* we held that the judge's order in form and substance was a final judgment of acquittal. The judge undertook an evaluation of all the evidence and determined on the record that the evidence was insufficient to sustain a conviction on any count. A formal order was written and granted. Under those circumstances, we affirmed the Court of Appeals holding that the judge could not stay the entry of this order pending the prosecutor's appeal and thus avoid the defendant's protection against double jeopardy. *Id.* at 622-624. Whether or not erroneous, the judge evaluated the evidence and entered a formal judgment of acquittal.

Unlike the trial judge in *Nix,* the trial judge in *Vincent* did not undertake an evaluation of all the evidence, nor did he render a statement of sufficient clarity and finality that could be construed as an order. Taken in the context of the entire proceedings, the impressions of the judge cannot be transformed into a directed verdict on the issue of premeditation and deliberation. Consequently, we hold that the judge's comment did not represent an actual resolution of some or all of the factual elements of the offense charged. Therefore, further proceedings were not barred by the Double Jeopardy Clause, and the defendant's rights were not violated.[5]

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[5] Three protections are embodied in the Double Jeopardy Clause: protections "against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense."

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We reaffirm the principles articulated in *Nix, Anderson, Martin Linen,* and *Smalis* and now undertake to explain why in this case there was no directed verdict.[6]

B

In *People v. Hampton,* 407 Mich 354; 285 NW2d 284 (1979), this Court considered the standards for directed verdicts, recognizing that inconsistency existed among the published decisions of the Court of Appeals. *Id.* at 366. In *Hampton,* we discussed the quantum of evidence required to survive a motion for directed verdict. In assessing the sufficiency of evidence we held that

> the trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, . . . in a light most favorable to the prosecution, . . . and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt . . . . [*Id.* at 368.]

Justices of Boston Municipal Court v. Lydon, 466 US 294, 306-307; 104 S Ct 1805; 80 L Ed 2d 311 (1984). Because we hold that there was no acquittal in this case, the principles embodied within these protections were not violated.

[6] We respectfully disagree with the dissent's statement that we are wilfully violating the principles articulated in this line of cases. The facts in the case at bar are distinguishable from both *Anderson* and *Nix, supra. Nix* is discussed in the body of the opinion. *Anderson* involved a trial judge's decision to accept a midtrial plea of guilty of manslaughter. When the judge accepted the plea, he dismissed charges of first- and second-degree murder and discharged the jury. *Id.* at 480-481. *Vincent* does not involve either the stay of a formal order as in *Nix* or the acceptance of a plea and subsequent dismissal of both the charges and the jury as in *Anderson.* This case turns on the characterization of an ambiguous statement of a trial judge.

As we stated, had we determined that the judge's remarks represented an actual resolution of a factual element of the offense charged, we would be compelled to reverse the decision of the Court of Appeals. Here, we decided that these remarks did not sufficiently resolve anything.

Following our decision in *Hampton,* we stated that "[r]etrial is not permitted if the trial court evaluated the evidence and determined that it was legally insufficient to sustain a conviction." *People v. Mehall,* 454 Mich 1, 6; 557 NW2d 110 (1997) (citing *Martin Linen*). In *Mehall* we held that there was no acquittal and that a retrial was not precluded when the judge failed to properly consider all the evidence under the standard articulated in *Hampton.* See also *People v. Wolfe,* 440 Mich 508; 489 NW2d 748 (1992).

We are not convinced that the standards articulated in *Hampton* and *Mehall* were met in this trial judge's statement of his impressions, nor are we convinced that the judge's statement rose to the requisite level of certainty and finality to constitute a directed verdict. There was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. *Mehall* at 6. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected because there was no mention of them reflected in the express remarks of the court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was

considering all the factors, there was no indication which factors he had actually considered or rejected.[7]

Accordingly we hold this general inconclusive statement to be no more than a judge thinking out loud. The foundation laid to support this conclusory impression was inadequate. When ruling on the sufficiency of the evidence, a court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis of the decision and a clear statement that the motion is either granted or denied.

C

In *Tiedman v. Tiedman,* 400 Mich 571, 576; 255 NW2d 632 (1977), Justice LEVIN observed that "[t]he rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. Generally, a judgment or order is reduced to written form, . . . until reduced to writing and signed, the judgment did not become effective. . . . " That case involved a civil

[7] Trial testimony indicated that the youths were going to Hamady to fight. They collected guns and ammunition and test-fired the weapons before arriving at the school. Vincent testified that he anticipated trouble because some other persons he might encounter did not like him. Further, testimony indicates that Vincent and Perkins reentered the Mustang together, knelt in the back seat, aimed the weapons out the raised hatchback, and commenced shooting. Further testimony indicated that the confrontation was gang related. From this, it is quite possible that a rational trier of fact could have found that the essential elements of the crime, premeditation and deliberation, were proven beyond a reasonable doubt. The trial court did not assess any of these proofs in the record or indicate why it might have believed that they were insufficient.

matter, but there is no reason that a lesser standard should be acceptable in criminal cases in which a defendant's liberty interest is at stake. Our rules of criminal procedure and our judgments based on them must not tolerate ambiguity or indecision in judgments rendered.

The Supreme Court of Washington has decided a case similar to the present one. In *State v. Collins,* 112 Wash 2d 303; 771 P2d 350 (1989), the trial judge orally dismissed a charge of third-degree assault as a result of the prosecutor's failure to produce sufficient evidence regarding the element of intent after hearing argument from both sides. *Id.* at 304. However, within minutes, the prosecutor offered further argument and authority, and the judge reinstated the charge. The defendant appealed, arguing that her double jeopardy rights had been violated.

In holding that the judge's oral ruling was not final when given, the Washington Supreme Court emphatically stated that it was returning to a "rule long followed in this state that a ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders." *Id.* at 308. In overruling a previous case embracing a rule that allowed for too many ambiguous and inconsistent results the court stated:

> The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork . . . . To serve the ends of certainty, reliance on the final written court order or written journal entry to determine the finality of a ruling is the better rule . . . [m]any judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated

> into the findings, conclusions, and judgment. [*Id.*][8]

We agree with this simple straightforward reasoning. A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our own court rules. MCR 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all. "Okay" does not equate with "It is so ordered." Further, we note that the trial court did not substantially comply with the requirement of MCR 6.419(D) that provides "[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal. . . . " As we stated in part II(B), the loose impressions of the judge cannot be construed as an adequate evaluation of the evidence. Instead, it reflects a tentative conclusion, not

[8] The standard overruled in *Collins* was enunciated in *State v. Dowling*, 98 Wash 2d 542, 547; 656 P2d 497 (1983), and provided that

> [a] finding by the court as the trier of fact, without a jury, when read conclusively into the record in such a manner as to indicate that it is neither tentative nor made with reservation or advisement nor subject to further consideration or proceedings in the same case, will support a judgment of acquittal or dismissal.

We note that even under this test, the trial court's impressions here would not support an acquittal because its comments were tentative, made with reservation, and subject to further consideration.

a formal resolution on the factual elements of the offense charged.

There was nothing to indicate that the judge's impression in this case was anything more than an initial assessment of a possible future ruling. *People v. Jackson*, 232 AD2d 193; 647 NYS2d 764 (1996). Similarly there was nothing to indicate that this was anything more than a continuing discussion between the parties. *State v. Newfield*, 161 Ariz 470, 472; 778 P2d 1366 (Ariz App, 1989). Further, we are inclined to agree with a decision of the United States Court of Appeals for the Second Circuit holding that a judge's decision to submit the charge to the jury implicitly denies the motion. *United States v. Bruno*, 873 F2d 555, 562 (CA 2, 1989).

The fact that the judge decided to entertain additional arguments the next day is further indication that he had not made a final decision. We are aware that how the judge characterizes his statement is not controlling, nor is the form of the so-called ruling controlling, but in this case we find that the judge was correct. He had not directed a verdict. Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. We would be hard pressed to call this kind of indecisive pondering a final judgment of acquittal.[9]

[9] We note that MCR 2.602(A) governs entry of judgment and orders in civil proceedings and that MCR 6.419 provides the rules to be followed in criminal proceedings. We are aware that the rules do not mandate formal motions or rulings, however, it is clear that a certain degree of formality is required. MCR 6.419 allows the trial court to

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III

We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

BOYLE, RILEY and WEAVER, JJ., concurred with MALLETT, C.J.

CAVANAGH, J. (*dissenting*). This case presents the identical issue we dealt with earlier this term in *People v.*

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state orally, or in writing, its reasons for denying or granting the motion. We leave trial judges with this choice, but caution that, whichever form is employed, the judgment must bear sufficient indicia of finality to survive an appeal. Factors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the judge or that a docket entry has been made reflecting the trial court's action. These examples are illustrative only because each case will turn on its own particular circumstances.

Nix, 453 Mich 619; 556 NW2d 866 (1996), which decision was based on controlling case law from the United States Supreme Court and this Court's acknowledgment of those binding precedents in *People v. Anderson*, 409 Mich 474; 295 NW2d 482 (1980). The majority purports to "reaffirm the principles articulated in *Nix* [and] *Anderson*," *ante*, p 121, but in fact departs from those principles. In so doing, the majority violates the rule of law. Accordingly, I dissent.

I

The legal principles that are dispositive of this case have not changed since they were set forth in *Nix:*

> In *Fong Foo v. United States*, 369 US 141; 82 S Ct 671; 7 L Ed 2d 629 (1962), the trial court, during presentation of the prosecutor's case in chief, "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. On appeal, the United States Court of Appeals for the First Circuit held that the district court was without power to direct the acquittals, and ordered the case remanded to the trial court. On further appeal, the United States Supreme Court held as follows: "The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.'" *Id.* at 143 (citing *United States v. Ball*, 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 [1896]).
>
> In *United States v. Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642

(1977), the United States Supreme Court reaffirmed this principle from *Ball* and *Fong Foo,* stating: "[W]e have emphasized that what constitutes 'an acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." (Citations omitted.)[4]

[4] This principle was more recently reaffirmed in *Smalis v. Pennsylvania,* 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986).

In *People v. Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), this Court acknowledged and applied this legal principle:

"To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions. '[T]he trial judge's characterization of his own actions cannot control the classification of the action.'[24] What constitutes an 'acquittal' is not controlled by the form of the judge's action.[25]

"To decide how a trial judge's action should be characterized, the reviewing court 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'[26] There is an acquittal and retrial is impermissible when the judge 'evaluated the Government's evidence and

determined that it was legally insufficient to sustain a conviction.'[27]

[24] *United States v. Scott* [437 US 82, 96; 98 S Ct 2187; 57 L Ed 2d 65 (1978)], quoting *United States v. Jorn* [400 US 470, 478, n 7; 91 S Ct 547; 27 L Ed 2d 543 (1971)] (plurality opinion). See *United States v. Martin Linen Supply Co, supra*. . . .

[25] *United States v. Martin Linen Supply Co, supra*, p 571.

[26] *Id.*

[27] *Id.*, p 572. See *People v. Hampton,* 407 Mich 354, 385-386; 285 NW2d 284 (1979) (RYAN, J.)."

[*Nix*, 453 Mich 624-626.]

The insignificant factual distinctions between *Nix* and the case at bar relied on by the majority notwithstanding, the application of these legal principles to the instant case is straightforward and warrants affirmance of the Court of Appeals.

II

A

In my opinion, the outcome of this case is determined by the following facts: the statements of the trial judge at issue here were made after the close of the prosecutor's case in chief and were in response to defense counsel's motions for directed verdicts of acquittal on the first-degree murder charges; the judge's statements expressed his legal opinion of the legal sufficiency of the evidence

presented relative to the appropriate degree of murder that a reasonable jury could find defendants guilty of; at the separate hearing conducted the next day there was no new evidence introduced; and, at this next day hearing, the trial judge, in response to defense counsel's argument that he had directed a verdict, said, "Oh, I granted a motion but I have not directed a verdict." [1]

Applying the controlling legal principles to these facts, I can only conclude that the trial judge considered all the prosecutor's evidence, and that, in his opinion,[2] that

[1] This latter statement of the trial judge evidences his belief that he had to actually instruct the jury on the charges it could consider before it could be said that he had directed a verdict on the first-degree murder charges. This statement by itself constitutes sufficient evidence that the trial judge was certain that he had ruled on the evidence relative to the first-degree murder charges. His belief that he could reverse that ruling simply because the jury did not know about it is clearly at odds with the legal principles reiterated in part I of this opinion.

In addition to the fact that the trial judge's understanding of the controlling legal principles was erroneous, the majority's conclusion that the trial judge's violation of MCR 6.419(A) was harmless error because "the presentation of the defense was not impaired," *ante*, p 631, n 1, is equally baseless. The defendant did not know what charges would be submitted to the jury, depriving him of knowledge he had an undisputed right to, knowledge that could have affected the presentation of his defense. More importantly, however, I reject the majority's attempt even to apply a harmless error analysis in this case. An error affecting a defendant's federal constitutional right not to be placed twice in jeopardy is not susceptible of harmless error analysis. The majority's attempt to employ this analysis is erroneous on its face, but is even more so by virtue of its mischaracterizing a federal constitutional violation as a mere violation of a state court procedural rule.

[2] Or his "impression" or his "think[ing]" or any other synonymous term that, in this context, connotes his "evaluation" of the evidence.

evidence was legally insufficient to allow a charge of first-degree murder to be submitted to the jury. "To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions." *Anderson,* 409 Mich at 486.

B

The trial judge's comments were as follows:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

The majority seizes upon the word "impression," when in fact the determinative phrase is "at this time" because this latter phrase refers to a chronological point after the

prosecution had presented all its evidence and closed its case in chief.[3]

The majority's selective extraction of two other phrases – "in the event that it's not our premeditation planning episode" and "[i]t may very well be" – further ignores the conclusive nature of the trial judge's statements. This is readily demonstrated by reading these phrases in their true context.

Referring to the participation of all three defendants in the crime for which they were tried, the trial judge said: "But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode." If looked at objectively, it should not be difficult to decipher the essential meaning of this sentence: Looking at the big picture with respect to what part, if any, each and every one of these defendants played in this event, it is not a case involving premeditation or planning.

The other phrase taken out of context by the majority undermines further its attempt to find uncertainty and indecision where, in fact, there exists judicious consideration and decision. The relevant sentence is, "'It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the

[3] The majority utilizes phrases such as "the judge's inchoate impressions," *ante,* p 118, "this conclusory impression," *id.* p 123, and "the loose impressions of the judge," *id.* p 125. None of these phrases, in my opinion, undermines the true character of the trial court's action.

planning of premeditation.'"[4] Paraphrased, accurately and in its entirety, the essence of this sentence is as follows: The fact that defendants had weapons may be evidence of their bad judgment, and it is evidence to be considered in determining their intent, but the mere existence of the weapons per se does not prove the premeditation or planning required for a charge of first-degree murder.[5] And the very next statement of the trial judge, ignored by the majority, shows the truly deliberative nature of his comments: "I have to consider all the factors." Then, having considered all the evidence, having looked at the "broad scope" of the circumstances of the crime, having "consider[ed] all the factors," the trial judge concluded: "And I think that Second Degree Murder is an appropriate charge as to the defendants."

C

The majority's disregard for the principles articulated in *Nix* and *Anderson* leads to its reliance on several irrelevant factors.

The majority emphasizes that the trial judge's statements were made "outside the hearing of the jury." *Ante*, p 114. This fact is of no consequence whatsoever for purposes of applying the federal constitutional decisions of the

[4] *Ante*, p 114.

[5] In rephrasing these statements of the trial judge, I imply no criticism whatsoever, grammatical or otherwise. The extemporaneous comments of a trial judge in the heat of trial should not be held to the same standards of grammar and diction one should rightly expect from the solitude of appellate chambers.

United States Supreme Court that we acknowledged and applied in *Nix* and *Anderson*.[6]

The majority also inappropriately relies on the majority decision of the Supreme Court of Washington in *State v. Collins*, 112 Wash 2d 303; 771 P2d 350 (1989). There are several reasons that this reliance is inappropriate, the dispositive one being that the *Collins* majority does not even purport to follow the relevant case law of the United States Supreme Court.[7] In fact, the *Collins* majority fails to even cite the relevant United States Supreme Court cases.[8]

III

In my opinion, the statements of the trial judge, made in response to defense counsel's motions for directed verdict of acquittal on the charges of first-degree murder, constitute "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply*, 430 US 571. Therefore, under the clear and controlling case law of the United States Supreme Court, "[t]he court's reversal of its directed verdict resulted in

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[6] I would also point out that during a jury trial, motions for directed verdict (and other motions seeking a legal ruling from the judge) are routinely argued and decided without the jury being present.

[7] Other reasons that the *Collins* decision is inapposite to the case at bar include the fact that *Collins* dealt with a bench trial and, more importantly, the *Collins* majority considered the issue before it solely in the context of a rule that Court previously had set forth purely as a matter of state law.

[8] The dissenting justice, however, correctly cites and applies *Fong Foo* and *Martin Linen Supply*. See *Collins, supra*, pp 311-314, 771 P2d 350.

further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge." 215 Mich App 458, 469; 546 NW2d 662 (1996) (citing *Smalis v. Pennsylvania, supra*).

I would affirm the decision of the Court of Appeals.

BRICKLEY and KELLY, JJ., concurred with CAVANAGH, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

vs.

KURT JONES,

Respondent.

CIVIL NO.:
98-CV-40007-FL

HONORABLE
PAUL V. GADOLA
HONORABLE
MARC L. GOLDMAN

REPORT AND RECOMMENDATION

I. INTRODUCTION

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. On April 3, 1992, Petitioner Duyonn Andre Vincent was found guilty of first-degree murder, M.C.L. §750.316, and possession of a firearm during the commission of a felony [felony firearm], M.C.L. §750.227b, following a jury trial before Judge Donald R. Freeman in the Genesee County Circuit Court. Petitioner was sentenced to a mandatory term of life imprisonment without the possibility of parole on the murder conviction and to a mandatory two-year term on the felony firearm conviction. At the time he filed this petition, Petitioner was incarcerated at Carson City Regional Facility in Carson City, Michigan. Respondent Kurt Jones is the Warden of that facility.

II. PROCEDURAL HISTORY

The facts giving rise to this petition are as follows.[1] Petitioner and co-defendants Dameon Perkins and Marcus Hopkins were jointly tried[2] on the charges of open murder[3] and possession of a firearm during the commission of a felony. On March 31, 1992, after the prosecution rested its case on March 31, 1992 and outside of the presence of the jury, Petitioner moved for a directed verdict of acquittal on the charge of first-degree murder based on the prosecution's alleged failure to present evidence establishing the elements of premeditation or deliberation.[4] The trial court heard argument from all of the attorneys. Defense counsel argued that even viewed in the light most favorable to the prosecution, there was insufficient evidence of premeditation and deliberation to permit the charge of first-degree murder to be considered by the jury. *See* Tr. Trans., Vol. IV, pp. 106-107. Defense counsel asked the court to dismiss the first-degree murder charge and to have the trial constinue [sic] on the charge of second-degree murder. The prosecutor opposed the motion. In doing so, he discussed the evidence presented which he believed established the

[1] The facts leading to Petitioner's convictions are set forth in *People v. Vincent*, 455 Mich 110, 565 N.W.2d 629 (1997), and need not be repeated here. Only the procedural aspects of this case are relevant to the issue before this court.

[2] Vincent and Hopkins were tried by one jury, while Perkins was tried by a second.

[3] The charge of open murder permits the finder of fact to determine the degree of murder. First-degree murder requires proof of premeditation and deliberation. M.C.L. § 750.316.

[4] The other two defendants also moved for directed verdict on the first-degree murder charge.

elements of premeditation and deliberation. *Id.* at pp. 111-116. Following completion of the arguments, the court stated:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll [Perkins' attorney] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. *I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.* [emphasis added]

Id. at p. 117. The court and counsel then discussed several unrelated matters. Before adjourning for the day, but after Petitioner and his co-defendants had been removed from the courtroom, the prosecutor asked if he could make a "brief restatement in terms of the First-degree Murder [charge]" when the jury returned on the following day because he wanted to "find some law." *Id.* at p. 123. The court responded: "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." *Id.* The court then adjourned for the day. Significantly, the docket shows an entry on March 31, 1992 stating:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER. CT: II FEL. FIREARM STAY THE SAME.

Petition, Appendix E.

The following morning, April 1, 1992, again outside of the presence of the jury, the prosecutor argued that based on the case law and the evidence, the jury should be allowed to determine whether first-degree murder had been established. Tr. Trans., Vol. V-A, pp. 3-17. Defense counsel argued that the court had directed a verdict of not guilty on the charge of first-degree murder the previous day and objected to the court's reconsideration of that decision on the basis of the constitutional prohibition against double jeopardy. *Id.* at p. 18-19. The following discussion then took place:

> THE COURT: Counsel, you have to bear in mind, I've not informed the jury of any of these things. You must recall the fact that we did not have the jury even brought back to the room. That because of our schedule and because of the representation made by Mr. Doll as to witnesses and the length of time that would be needed, we decided it might be better to start this morning so as to have some continuity in their testimony.
>
> MR. ODETTE [Petitioner's trial counsel]: Right, Judge, I . . .
>
> THE COURT: So the jury knows nothing about any of this.
>
> MR. ODETTE: That's correct, they don't. I'm not disputing that but it's my firm impression when I left the court yesterday that there had been a ruling and that [the prosecutor] had indicated

he'd like to have the matter reconsidered and I believe the Court said whatever.

THE COURT: That's right. And I, well I said "yes I'd be glad to listen" or words to that effect.

MR. ODETTE: Well it's our position that at this point that that decision was made. We . . .

THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are involved in it and particularly to the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it's done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

MR. ODETTE: That's . . .

THE COURT: You understand what I'm saying?

MR. ODETTE: I do.

THE COURT: And I've not told the jury anything.

MR. ODETTE: I do entirely, I don't dispute any of that. But I, it was my firm impression and belief that the Court had made a ruling . . .

THE COURT: All right.

Id. at pp. 18-20.

Petitioner's attorney then addressed the merits of the prosecutor's argument regarding deliberation and premeditation. Hopkins' attorney reiterated the arguments of Petitioner's counsel on the issue of double jeopardy. The court insisted that it had not directed a verdict as to anybody the previous day. *Id.* at p. 22. However, when Hopkins' counsel stated that the court had granted the motion, the court replied: "Oh, I granted a motion but I have not directed a verdict." *Id.* at pp. 22-23.

In response to the arguments presented by counsel for Perkins, the prosecutor presented further argument to support his position that there was sufficient evidence of premeditation to permit the charge of first-degree murder to be submitted to the jury. The trial court took the matter under advisement, stating:

> Well I'm going to consider the argument that Counsel has made. And Counsel should be certainly aware of the fact that there has been no harm that has come about by the Court[']s ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it.

Id. at p. 30. That afternoon, Petitioner's counsel presented one defense witness and Petitioner testified on his own behalf.

The following morning, April 2, 1992, after all the defendants had rested their cases, the court stated: "I've reconsidered the ruling the Court earlier made and I've decided to let the jury make its own determination on the Degrees." Tr. Trans., Vol. VI, pp. 3-4. The court submitted

the charge of first-degree murder to the jury, and the jury found Petitioner guilty of first-degree murder and of felony firearm.[5] Petitioner's counsel renewed his motion for directed verdict, but the court denied it. Tr. Trans., Vol. VII, pp. 79-80. Petitioner was sentenced on May 14, 1992 to mandatory life in prison.

Following his convictions and sentence, Petitioner appealed as of right to the Michigan Court of Appeals. The primary issue on appeal was whether the trial court had violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by reversing its grant of a directed verdict on the charge of first-degree murder. The Michigan Court of Appeals agreed that Petitioner's conviction for first-degree murder had violated his constitutional right not to be placed twice in jeopardy. In a published opinion, the Michigan Court of Appeals reversed the first-degree murder conviction and remanded the case for entry of a second-degree murder conviction and for re-sentencing. *People v. Vincent*, 215 Mich App 458, 546 N.W.2d 662 (1996). Relying on *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the court explained:

> [W]e are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the

[5] Perkins' jury convicted him of second-degree murder and felony firearm. Hopkins' jury, the same as Petitioner's, convicted Hopkins of involuntary manslaughter and felony firearm.

> first-degree murder charge in violation of defendant's double jeopardy rights.
>
> * * *
>
> The fact that the trial court in the case at bar did not inform the jury that it had directed a verdict of not guilty on the first-degree murder charge did not prevent its ruling from taking effect.
>
> * * *
>
> The trial court communicated its decision directing a verdict of acquittal on the first-degree murder charge to the prosecutor, all three defense counsel, and all three defendants. This made the court's ruling binding.

Vincent, 546 N.W.2d at 665-666.

The state then filed an application for leave to appeal in the Michigan Supreme Court. That application was granted. In a decision dated June 15, 1997, the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals and reinstated the first-degree murder conviction by a vote of four to three. *People v. Vincent*, 455 Mich 110, 565 N.W.2d 629 (1997). The Michigan Supreme Court stated:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the

> sufficiency of the evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Vincent, 565 N.W.2d at 636.

However, the dissent disagreed with this characterization. Justice Michael Cavanaugh, in an opinion joined by two other justices, wrote:

> In my opinion, the statements of the trial judge, made in response to defense counsel's motions for directed verdict of acquittal on the charges of first-degree murder, constitute "a resolution, correct or not, of some or all of the factual elements of the offense charged." [*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).] Therefore, under the clear and controlling case law of the United States Supreme Court, "[t]he court's reversal of its directed verdict resulted in further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge." [*Vincent*,] 215 Mich. App. 458, 469, 546 N.W.2d 662 (1996) (citing *Smalis v. Pennsylvania, supra*).

Vincent, 565 N.W.2d at 639.

Petitioner filed a motion for reconsideration, directing the court's attention to the docket entry of March 31, 1992. Petitioner argued that the entry reflected the trial court's decision to grant the motion for directed verdict on the first-degree murder count. The Michigan Supreme Court denied reconsideration by a vote of five to two. *People v. Vincent*, 456 Mich. 1201 (1997).

Petitioner filed a petition for a writ of certiorari in the United States Supreme Court. On November 10, 1997, the United States Supreme Court denied the petition. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Petitioner, represented by counsel, then filed this petition for writ of habeas corpus. Petitioner contends that the trial court's statement on March 31, 1992 constituted an acquittal on the charge of first-degree murder and thereby terminated his jeopardy with respect to that offense. In support of this interpretation, he notes that the trial court's decision is memorialized in the docket entry stating that the charge of open murder was reduced to second-degree murder. Petitioner requests this court to order the State of Michigan to reduce his first-degree murder conviction to second-degree murder and to resentence him on the reduced charge.

Respondent contends that Petitioner has not demonstrated that the Michigan Supreme Court's decision was contrary to clearly established law, as determined by the United States Supreme Court. He further argues that the Petitioner has not shown that the state court decision was based on an unreasonably determination of the facts presented in light of the evidence. *See* 28 U.S.C. § 2254(d). Petitioner filed a reply and this matter is ready for decision.

III. ANALYSIS

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ["AEDPA"] created a new standard of review that federal courts must apply when reviewing applications for a writ of habeas corpus filed after April 24, 1996, the effective date of the act. That standard of review is codified in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The United States Supreme Court has recently explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000). *See also Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000). In *Williams*, the Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable . . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

In deciding whether a state court's factual determination is reasonable, a federal court must presume the correctness of state court factual determinations. 28

U.S.C. § 2254(e)(1)[6]; *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous"). A petitioner may rebut the presumption of correctness only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). However, the 'presumption only applies to basic, primary facts, and not to mixed questions of law and fact." *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). It also applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility. *Coe v. Bell*, 209 F.3d 815, 823 n. 2 (6th Cir.), *cert. denied*, 120 S.Ct. 1716 (2000). For this purpose, "factual issues" are defined as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Bryson v. Ward*, 187 F.3d 1193, 1211 (10th Cir. 1999) (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n. 6 (1963)). *See also Carter*, 218 F.3d at 590. With these standards in mind, I will address the merits of the petition for writ of habeas corpus.

B. Double Jeopardy

Petitioner contends that his conviction for first-degree murder violates the Double Jeopardy Clause of the Fifth Amendment. He contends that the trial court granted his

[6] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

motion for directed verdict on the charge of first-degree murder based on insufficient evidence of premeditation and deliberation, then reconsidered and reversed its ruling and submitted that charge to the jury. Petitioner submits that under these circumstances, he was twice placed in jeopardy on the charge of first-degree murder.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V., and applies to state prosecutions through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Double Jeopardy Clause provides three separate protections for criminal defendants, one of which is the protection against a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted).

In *Serfass v. United States*, 420 U.S. 377, 387-388 (1975), the Supreme Court articulated the purposes of the constitutional protection against double jeopardy, stating:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continual state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."

(quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)).

Under clearly-established federal law, as determined by the United States Supreme Court, if a trial court has evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction, that determination of insufficiency is an acquittal for purposes of the Double Jeopardy Clause; further proceedings – appeal by the prosecution or retrial – are barred. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). *See Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986) (holding that grant of demurrer at the close of the prosecution's case-in-chief because of insufficient evidence was actually an acquittal). Indeed, a determination that there was insufficient evidence for conviction, whether rendered by the jury or directed by the trial judge, operates as an "absolute[ ] shield[ ]" against retrial under the Double Jeopardy Clause. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

In deciding whether Petitioner's double jeopardy rights under the Fifth Amendment were violated, a determination must be made as to whether the trial court's statements on March 31, 1992 concerning the sufficiency of the evidence of deliberation or premeditation, an essential element of the charge of first-degree murder under Michigan law, was actually an "acquittal" on that charge. If so, Petitioner was subjected to further proceedings in violation of the Double Jeopardy Clause when the trial court reversed its ruling and allowed the jury to consider the charge of first-degree murder.

In determining whether the trial court's statement constituted an "acquittal," a reviewing court must assess

whether the substance, not the form, of the trial court's ruling, "whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571 ("what constitutes an 'acquittal' is not to be controlled by the form of the judge's action"). The reviewing court does not, however, review the trial court's ruling to determine whether it was correct. The Supreme Court, in *Sanabria v. United States*, 437 U.S. 54 (1978), declared that "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be." *Id.* at 75 (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

In *Smalis*, a husband and wife, who owned a building housing a restaurant and an apartment, were charged with various crimes in connection with a fire in the building. At the close of the prosecution's case-in-chief, the defendants challenged the sufficiency of the evidence by filing a demurrer. The trial court sustained the demurrer, saying it was not satisfied there was sufficient evidence from which it could be concluded that either of the defendants were guilty beyond a reasonable doubt. The issue was whether the State's attempt to appeal that decision would violate the Double Jeopardy Clause. The Superior Court of Pennsylvania quashed the appeal, holding that it was barred by the Double Jeopardy Clause. *Commonwealth v. Smalis*, 480 A.2d 1046 (1984). In a consolidated appeal by the Commonwealth, the Supreme Court of Pennsylvania reversed, finding no double jeopardy violation on the basis that a "demurrer [wa]s not a factual determination. . . . [T]he question before the trial judge in

ruling on a demurrer remain[ed] purely one of law." *Commonwealth v. Zoller*, 490 A.2d 394, 401 (1985).

The United States Supreme Court granted certiorari and reversed the Pennsylvania Supreme Court. The Court found first that the sustaining of a demurrer constitutes an acquittal under the Double Jeopardy Clause. Significantly, the Court noted that "the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer [wa]s not binding on [them]." *Smalis*, 476 U.S. at 144 n. 5. Next, the Court rejected the Commonwealth's argument that resuming the trial following a reversal on appeal would simply constitute "continuing" jeopardy, rather than double jeopardy, concluding that an acquittal terminated the proceeding. The Court stated:

> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Martin Linen*, 430 U.S. at 570.

Smalis, 476 U.S. at 145-146.

The question of whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of the trial court's actions under state law, nor by the trial judge's understanding in this regard. *Smalis*, 476 U.S. at 144 n. 5; *United States v. Scott*, 437 U.S. 82, 96 (1978); *United States v. Sisson*, 399 U.S. 267, 290 (1970). The determinative factor is whether the decision is actually an acquittal for double jeopardy purposes, even if state law or the trial court may have characterized it otherwise. *See Martin Linen*, 430 U.S. at 571 n. 9.

In examining the trial court's March 31, 1992 statement, the Michigan Supreme Court found that it did not represent "an actual resolution of some or all of the factual elements of the offense charged" because:

> the trial judge . . . did not undertake an evaluation of all the evidence, nor did he render a statement of sufficient clarity and finality that could be construed as an order. Taken in the context of the entire proceedings, the impressions of the judge cannot be transformed into a directed verdict on the issue of premeditation and deliberation.

Vincent, 565 N.W.2d at 633. The court further stated that:

> [t]here was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected in the express remarks of the court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was considering all the factors, there was no indication

which factors he had actually considered or rejected.[7]

Id. at 634. The Michigan Supreme Court found that the trial court's statement reflected only "a tentative conclusion" or an "initial assessment of a possible future ruling." *Id.* at 635. It also noted that the trial judge's use of statements such as "[m]y impression," "I think," and "it may very well be," did not "resound in finality" and were "clearly equivocal" and, therefore, considered his statements to be "no more than a judge thinking out loud." *Id.* at 634-635. The court concluded that because the trial court's "indecisive pondering" lacked sufficient indicia of formality associated with a final judgment, it did not constitute an acquittal. Accordingly, the court held that the continuation of the trial and Petitioner's subsequent conviction of first-degree murder did not violate his constitutional rights. *Id.* at 635-636.

The decision of the Michigan Supreme Court that the trial court's assessment of the evidence on March 31, 1992 was erroneous and that under Michigan law, his statements were not sufficiently clear to constitute a final judgment, is not determinative of whether that ruling constitutes an acquittal for double jeopardy purposes. Under *Smalis*, a federal court is not required to defer to

[7] In a footnote, the court discussed the evidence presented at trial which it believed could have proved beyond a reasonable doubt the elements of premeditation and deliberation and noted that the "trial court did not assess any of these proofs in the record or indicate why it might have believed that they were insufficient." *Id.* at 634 n. 9. Whether or not the trial court's ruling was erroneous is irrelevant for purposes of determining whether that ruling constitutes an acquittal. *See Sanabria*, 437 U.S. at 75.

the conclusion of the Michigan Supreme Court that the trial court's statement did not constitute an acquittal under state law.[8] While the state courts can undoubtedly determine what is necessary, as a matter of state law, to sufficiently articulate a "final judgment" of acquittal, the issue before this court does not require a review of that decision, which involves a question of state law that is obviously beyond the scope of federal habeas review.

This case does not present a factual dispute. The trial court's statements are not contested. Rather, it is the legal consequences of those statements which are in dispute. The legal consequences turn, as in *Smalis* on an interpretation of double jeopardy law under the Constitution. Therefore, the sole issue before this court is the federal question of whether the trial court's March 31, 1992 statement constituted an "acquittal" on the charge of first-degree murder, which would bar any "further proceedings . . . devoted to the resolution of factual issues going to the elements" of that offense. *Smalis*, 476 U.S. at 145-46 (citing *Martin Linen*, 430 U.S. at 570).

Applying the controlling legal principles established by Supreme Court precedent, I find that the trial court's statement "actually represents a resolution [in Petitioner's

[8] At the hearing on this petition, the Court brought to the parties' attention an unpublished opinion of the Ninth Circuit in which the court found that the state court's determination of what constituted an acquittal was binding for purposes of double jeopardy. *Bergstrom v. Walter*, ___ F.3d. ___, 1998 WL 391469 (9th Cir. April 16, 1998). However, upon reviewing the case upon which the Ninth Circuit relied in making that statement, *see Bonillas v. Hill*, 134 F.3d 1414 (9th Cir. 1998), I conclude that *Bergstrom* is both factually and legally inapplicable to this case.

favor] . . . of some or all of the factual elements" of first-degree murder and, therefore, constitutes an "acquittal" for double jeopardy purposes. *Martin Linen*, 430 U.S. at 571. The undisputed facts show that the trial court's statement was made after the prosecution had rested its case and immediately following oral argument on Petitioner's motion for directed verdict in which the evidence of deliberation and premeditation was discussed by both sides. The trial court assessed the sufficiency of that evidence and concluded that "Second Degree Murder [wa]s an appropriate charge as to the defendants." The factors relied on by the Michigan Supreme Court, i.e., that the trial court's decision had not become final; that the trial judge did not sufficiently discuss all the evidence; that the trial judge's remarks were made outside of the presence of the jury; and that there was no oral or written ruling clearly detailing the exact reasons for granting the motion; are all irrelevant. The substance of the trial court's statements was clearly a determinative ruling on the sufficiency of the evidence of premeditation and deliberation and constituted a verdict of acquittal on the first-degree murder charge for double jeopardy purposes. *See United States v. Ball*, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."). Indeed, that decision was formalized by the docket entry of March 31, 1992, indicating that the charge of open murder was amended to second-degree murder.[9]

[9] As pointed out by Petitioner, the Michigan Supreme Court stated in a footnote that one factor to be considered in evaluating "finality" is a docket entry reflecting the trial court's action. *Vincent*, 565 N.W.2d at

(Continued on following page)

Adding weight to this conclusion is the trial judge's characterization of his March 31, 1992 statement as a ruling during the arguments on the following day. Indeed, the trial judge specifically referred to his statements as "the Court[']s ruling." The trial court also specifically acknowledged that it had "granted a motion," but maintained that it could revisit its earlier ruling without violating the Double Jeopardy Clause because it had not "directed a verdict" or informed the jury of that ruling. The conclusion that the trial judge could reconsider and reverse his initial ruling simply because he had not actually informed the jury or directed a verdict to the jury is simply erroneous. "It is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal." *Sanabria*, 437 U.S. at 65 n. 18 (citing *Martin Linen*, 430 U.S. at 567 n. 5, 573; *United States v. Sisson*, 399 U.S. 267, 290 (1970)). The trial court explicitly informed all of the necessary parties, namely Petitioner, his co-defendants, and all counsel that the appropriate charge was second degree murder. This was an acquittal on the charge of first-degree murder for jeopardy purposes. The trial judge's attempt to modify the effect of his ruling by hearing arguments from the prosecution on the following

635 n. 9. Apparently, no one was aware at the time of the decision that any such entry had been made. Notwithstanding the discovery of the docket entry, the Michigan Supreme Court denied Petitioner's request for reconsideration on this basis.

day does not change the substance of his decision on March 31, 1992.[10]

There is no indication whatsoever in the trial court's March 31, 1992 statement that the trial judge believed that he had taken the matter under advisement, had reached only a "tentative conclusion," or was simply "thinking out loud," as found by the Michigan Supreme Court. Contrary to the Michigan Supreme Court's interpretation of the trial judge's statement, it was not inchoate or ambiguous, nor made subject to further consideration or advisement. It was an explicit finding that the evidence was insufficient to support a verdict of first-degree murder.

I therefore find, based upon the record as a whole, that the trial court's statement on Petitioner's motion for a directed verdict constituted a decision that the evidence presented by the prosecution was insufficient to show premeditation or deliberation to convict Petitioner of first-degree murder and was an acquittal for the purposes of the Double Jeopardy Clause under clearly-established

[10] As the Supreme Court has indicated, the principles embodied in the constitutional guarantees against double jeopardy protect an individual from repeated attempts by the state with all its resources and power to convict him of an alleged offense, thereby subjecting him "to live in a continual state of anxiety and insecurity." *See Serfass*, 420 U. S. at 387-388. It is important to note that it was not until after Petitioner had been removed from the courtroom on March 31, 1992, following the trial court's statement that the evidence was insufficient to establish first-degree murder, that the trial court agreed to permit the prosecution to make additional arguments the next day. Therefore, at the time Petitioner had left the courtroom for the day, he could only have been under the impression that he had been acquitted of first-degree murder.

precedent of the United States Supreme Court. That the trial court later reconsidered its ruling or may have erred in its initial ruling is of no significance. *See Sanabria*, 437 U.S. at 68-69 (erroneous evidentiary ruling leading to erroneous judgment of acquittal for insufficient evidence bars further prosecution). The trial court's reconsideration and reversal of its March 31, 1992 decision subjected Petitioner to "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" in violation of the Double Jeopardy Clause. *Smalis*, 476 U. S. at 145-46.

Although the decision of the Michigan Supreme Court to declare when a trial court has issued a final judgment under state law is entitled to complete deference and cannot be reviewed by this court, it is "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," to conclude that the trial court's statement lacked sufficient indicia of finality as to constitute an "acquittal" on the first-degree murder charge. Based on my finding that the substance of the trial court's statement constituted an acquittal for double jeopardy purposes and because the Double Jeopardy Clause bars re-trial from a judgment of acquittal, I find that Petitioner's constitutional rights under the Fifth Amendment were violated by being twice placed in jeopardy for the same offense. Consequently, Petitioner's first-degree murder conviction and sentence cannot stand.

I therefore respectfully recommend that the petition for writ of habeas corpus be granted. As found by the Michigan Court of Appeals, the proper remedy under Michigan law is to remand for entry of a conviction of second-degree murder and for resentencing. *See Vincent*,

546 N.W.2d at 668 (citing *People v. Hoffmeister*, 394 Mich. 155, 161-162, 229 N.W.2d 305, 308-309 (1975)).

IV. CONCLUSION

For the reasons stated, I conclude that the Michigan Supreme Court's determination that Petitioner's constitutional right not to be subject to double jeopardy involved an unreasonable application of clearly established federal law, as established by Supreme Court precedent. Accordingly, I respectfully recommend that this petition for writ of habeas corpus be **GRANTED** and that this case be **REMANDED** for entry of a conviction of second-degree murder and for resentencing.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the court, in its

discretion, may enlarge the period of time in which to file objections to this report.

/s/ Marc L. Goldman
MARC L. GOLDMAN
UNITED STATES
MAGISTRATE JUDGE

Date: August 24, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

v.

KURT JONES,

Respondent.

_____/

CIVIL CASE NO. 98-40007

HONORABLE PAUL V. GADOLA U.S. DISTRICT JUDGE

ORDER OVERRULING RESPONDENT'S OBJECTIONS AND ACCEPTING MAGISTRATE JUDGE GOLDMAN'S REPORT AND RECOMMENDATION

(Filed Nov. 3, 2000)

Pursuant to 28 U.S.C. § 636(b)(1)(b), Rule 72(b) of the Federal Rules of Civil Procedure, and Local Rule 72.1(d)(2), the Court has reviewed Magistrate Judge Marc L. Goldman's report and recommendation filed August 24, 2000. Respondent filed his objections to that report and recommendation on September 11, 2000. Petitioner filed his response to Respondent's objections on September 19, 2000. After reviewing the record and the applicable law, this Court overrules Respondent's objections and accepts Magistrate Judge Goldman's report and recommendation as the Court's opinion.

First, Respondent objects that Magistrate Judge Goldman incorrectly concluded that whether the trial judge's statements of March 31, 1992 constituted an acquittal for Petitioner as to a charge of first-degree

murder was a question of law, not fact. (Resp. Brf. at 2.) Because, Respondent argues, that issue was a matter of fact, Magistrate Judge Goldman improperly failed to afford the Michigan Supreme Court's determination – that the trial judge's statements did not constitute an acquittal – the broad deference afforded by 28 U.S.C. § 2254(d)(2).

Respondent's objection is ill founded; Magistrate Judge Goldman was correct to treat this issue as a question of law, not fact. Magistrate Judge Goldman correctly noted that "the trial court's statements are not in dispute. Rather, it is the legal consequences of those statements which are in dispute." (Report and Recommendation at 17.) The legal impact of uncontroverted facts is a question of law. *See Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987); *Colonial Refrigerated Trans., Inc. v. Mitchell*, 403 F.2d 541, 547 (5th Cir. 1968). It follows that Magistrate Judge Goldman did not owe the Michigan Supreme Court's determination that the trial court had not acquitted Petitioner the broad deference due to a determination of fact. The Court thus overrules Respondent's first objection.

Respondent's second objection is that Magistrate Judge Goldman improperly failed to consider cases in which courts have held a trial judge's ambiguous statements regarding acquittal not to constitute an acquittal. (Resp. Brf. at 3.) In support of this argument, Respondent cites *United States v. LoRusso*, 695 F.2d 45 (2d Cir. 1986), *Matter of Lionel F.*, 558 N.E.2d 30 (N.Y. 1990), *Robinson v. Clarke*, 939 F.2d 573 (8th Cir. 1991), and *United States v. Washington*, 48 F.3d 73 (2d Cir. 1995). Respondent cites to no specific page in any of these cases that would support his position, nor does he provide further elaboration as to why these cases militate in favor of his argument. The

Court is thus forced to do what Respondent should have done for himself; i.e., it must sift through these cases seeking support for Respondent's stance.

At first, *LoRusso* seems to buttress Respondent's argument. In that case, the Second Circuit reasoned that the trial court could amend promptly its oral decision granting a motion for judgment of acquittal because so doing would not subject the defendants to a second trial in violation of the Double Jeopardy Clause. *See LoRusso,* 695 F.2d at 54. Since that decision however, the Supreme Court has made clear that the Double Jeopardy Clause precludes review of an acquittal "not only when it might result in a second trial, but also if reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the element of the offense charged." *Smalis v. Pennsylvania,* 476 U.S. 140, 146 (1986) (internal quotation omitted).

Washington and *Lionel F.* do not aid Respondent because they are factually distinct. In *Washington,* the trial judge "exercised the earliest available opportunity – the adjournment for lunch – to reconsider and modify its order." *Washington,* 48 F.3d at 79. Almost precisely the same situation occurred in *Lionel F. See Lionel F.,* 558 N.E.2d at 31. It is at least colorable that in those cases the defendants were not subject to "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense" of which they had been acquitted; i.e., it could possibly be that the defendants in *Washington* and *Lionel F.* were subject to one uninterrupted proceeding relating to the charges of which the trial judge had momentarily acquitted them. *Smalis,* 476 U.S. at 146.

Here, however, the trial judge waited two days to reverse his granting of a directed verdict of acquittal as to the charge of first-degree murder, and did so after that directed verdict had been entered in the court's docket. (Report and Recommendation at 3.) At that point, further proceedings as to the count of first-degree murder ensued.

Robinson is inapposite because, in that case, the trial judge clearly had not issued an oral judgment of acquittal. *See Robinson,* 939 F.2d at 577. The four cases upon which Respondent relies for its second objection do not, in short, compel the result that Respondent seeks. The Court therefore overrules Respondent's second objection.

Respondent's third objection is that Magistrate Judge Goldman "failed to consider Respondent's argument that even if the trial judge had unambiguously granted Petitioner's motion for directed verdict, the court could consider the issue the next day, so long as the jury had not been informed of the directed verdict." (Resp. Brf. at 3.) Based on a review of the record and the applicable legal standard, this Court concludes that whether the jury knew of the directed verdict is irrelevant. What is dispositive is that Petitioner was subject to a further proceeding on the charge of first-degree murder after the trial judge had orally granted a directed verdict as to that charge. For this reason, the Court overrules Respondent's third objection.

Accordingly, this court being fully advised in the premises,

IT IS HEREBY ORDERED that Respondent's objections to the report and recommendation [docket entry 32] are **OVERRULED.**

IT IS FURTHER ORDERED that Magistrate Judge Goldman's report and recommendation of August 24, 2000 [docket entry 31] is **ACCEPTED** as the Court's opinion.

SO ORDERED.

Dated: 11/2/00

/s/ Paul V. Gadola
HONORABLE
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

v

KURT JONES,

Respondent.
_____/

CIVIL ACTION
NO: 98-40007

JUDGMENT

(Filed Nov. 3, 2000)

This court having entered an order accepting the Magistrate Judge's Report and Recommendation as the findings and conclusion of the court;

IT IS ORDERED AND ADJUDGED that judgment be entered for Petitioner, that the petition for writ of habeas corpus be Granted and that this case be Remanded for entry of a conviction of second-degree murder and for resentencing.

Dated: November 3, 2000

DAVID J. WEAVER, CLERK

By: /s/ Ruth A. Chopp
Ruth A. Chopp
Deputy Clerk